No. 2944

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

In re:
MOK NUEY TAU, on Habeas Corpus,
Appellant,

vs.

EDWARD WHITE, as Commissioner, etc.
Appellee.

Brief for Appellant

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STATEMENT OF THE CASE.

Mok Nuey Tau is a foreign born son of Mok Jack, who is a native born citizen of the United States, whose status as such native-born citizen is conceded in these proceedings. Mok Jack sent to China for his son Mok Nuey Tau, to come to the United States, and in compliance therewith, he arrived at the port of San Francisco on the ss. "Mongolia" on October

26, 1915, and after due examination into his status as such citizen, he, the said Mok Nuey Tau, was ordered admitted into the United States, as a citizen thereof, by the Commissioner of Immigration at the port of San Francisco on November 9th, 1915, and ever since said date the said Mok Nuey Tau has lived within the United States, mixed with and become a part of the population thereof. He was 8 years of age when admitted into the United States. His father, Mok Jack, was then, and now is a resident of Oakland, California (Tr. 5 and 7.)

Mok Nuey Tau, while at large, as part and parcel of the citizenship of the United States, was arrested in the State of Alabama, on an executive warrant of arrest issued by the Secretary of Labor, and after a hearing, in which his minority was ignored, he was ordered deported by the Secretary of Labor upon the grounds hereinafter set forth.

At this hearing, Mok Nuey Tau, a little boy then but 9 years of age, a minor, and hence unable to enter a contract or appear civilly upon his own behalf, was made the defendant in a deportation proceeding and without affording him a proper opportunity to defend himself or have his father notified, so he could do so for him, his case was closed, and despite the affirmative evidence of his citizenship, and the fact that there was no evidence of alienage, he was none the less adjudged an alien who had entered the United States in violation of law.

"The warrant of arrest was issued under Section 21 of the Immigration Act, approved Feby.

20, 1907, being subject to deportation under the provisions of a law of the United States, to wit: the Chinese Exclusion laws, for the following among other reasons:

"That he has been found within the United States in violation of Section 6, Chinese exclusion act of May 5, 1892, as amended by the Act of November 3rd, 1893, being a Chinese laborer not in possession of a certificate of residence; and that he has been found within the United States in violation of rule 9, Chinese rules, and of the Supreme Court decision on which such rule is based, having secured admission by fraud, not having been at the time of entry the minor son of a member of the exempt classes, and

"Whereas from evidence submitted to me, it appears that the said alien has been found in the United States, in violation of the Act of February 20th, 1907, amended by the Act approved March 26, 1910, for the following among other reasons:

"That he arrived in the United States under sixteen years of age, unaccompanied by one or both of his parents; and that he was a person likely to become a public charge at the time of his entry into the United States."

The appellant was ordered deported under the General Immigration law, though in truth and in fact, the said detained was entitled to a hearing before a justice, judge or commissioner of the Judicial Department of the United States, to determine the

legality or non-legality of his residence in the United States.

The petition for the writ of habeas corpus is applied for by Mok Jack, the father, on his behalf and that of his son (Tr. 3 to 8.)

The Immigration record was presented in court and deemed a part of the petition. (Tr. 10.) The respondent interposed a demurrer. (Tr. 11) which the lower court sustained (Tr. 12.) This appeal is taken therefrom.

POINTS URGED.

1. That there was no evidence of alienage before the Secretary of Labor, and there was *prima facie* evidence of citizenship and said warrant of deportation being without evidence to support it is void.

2. That the appellant is a person of Chinese descent, and if illegally here under the facts charged, is entitled to have that fact determined by the Judicial branch of the Government, and the Secretary of Labor is without jurisdiction in the premises.

3. That the Executive hearing was unfair, no adequate provision being made to safeguard the interests of the defendant, he being under the disability of minority.

FIRST.

Upon the first point we submit that the father is a native-born citizen of the United States and is conceded in these proceedings to be such. The son, it is further conceded made regular application to enter the United States as a citizen thereof, and after due investigation, was ordered admitted into the United States, as a citizen thereof. His entry was regular. The immigration authorities, under their regulations, first admitted Mok Nuey Tau under the Immigration Law, and then the Chinese Exclusion or Restriction Acts.

Ex parte Wong Tuey Hing 213 Fed. 112.

> "I am of the opinion that if petitioner is unlawfully in this country it is not because of his being an alien, but because he is a Chinese alien; that is to say, if he is unlawfully here, it is not because of the provisions of the immigration law, but because of the provisions of the Chinese exclusion laws. If he entered without inspection, as the warrant of deportation recites, it was because the immigration officers did not desire to inspect him, not because he prevented them from doing so.

Rule 3 of the regulations governing the admission of Chinese, provides as follows:

'Chinese aliens shall be examined as to their right to admission to the United States under the provisions of the law regulating immigration as well as under the laws relating to the exclusion of Chinese. As the immigration act relates to aliens in general, the status of Chinese applying for admission must first be determined in accordance with the terms of that law and of the regulations drawn in pursuance thereof; then, if found admissible under such law and regulations, their status under the Chinese exclusion laws and regulations shall be determined.'

"It is evident therefore that, if the immigration officers failed to inquire into petitioner's status as an alien as distinguished from his status as a Chinese alien, they did so in violation of this rule, and cannot now hold petitioner responsible therefor."

The record of the landing of Mok Nuey Tau, the sworn evidence therein contained, show by a preponderance of evidence his American citizenship. There was no proper evidence of alienage at all, and the finding of the Secretary of Labor that Mok Nuey Tau was an alien, is without evidence to support it.

Whitfield vs. Hanges 222 Fed. 745.

Ong Chew Lung vs. Burnett 232 Fed. 853.

Chan Kam vs. U. S. 232 Fed. 855.

The warrant is issued out of hostility to the statute under which foreign born sons of citizens of the United States, derive their citizenship. The following cases embody decisions of the Department of Labor, practically contemporaneous in point of time, which show this attitude, as indeed Rule 9 mentioned in Ex. "A" herein and in the following cases also, discloses:

Ex parte Lee Dung Moo 230 Fed. 746.

Ex parte Leong Wah Jam 230 Fed. 540.

Ex parte Ng Doo Wong 230 Fed. 751.

Ex parte Tom Toy Tin 230 Fed. 747.

The Government did not appeal from these decisions construing the Rule 9 therein mentioned, which is the same Rule 9 mentioned in Ex. "A," but had the matter referred to the Attorney General of the United States. His opinion was adverse to the views of the officials of the Labor Department and upheld the Court opinions. That portion of Rule 9 was thereafter revoked.

The conclusion of alienage springs from suspicion and not from the evidence. The defendant had the burden of proof to meet when he arrived at this country, and he satisfactorily met it, and established his citizenship. Now the burden of proof has shifted, and it is on the government to show alienage. This

they have not done. The conclusion of alienage is the offspring of an unfounded suspicion. The Certificate of Identity, and the evidence given on his application to land, is worth something as evidence; it makes out a *prima facie* case.

Lin Hop Fong vs. U. S. 209 U. S. 453.

Wong Yee Toon vs. Stump 233 Fed. 194.

Ex parte Lam Pui 217 Fed. 456.

Ex parte Lam Fuk Tak 217 Fed. 468.

U. S. vs. Quan Wah, 214 Fed. 462.

SECOND:

Upon this point it is urged that the appellant did not enter the United States in violation of the Immigration Law, and it is only by a forced, unnatural and we feel unwarranted construction of the facts, that this point is rendered seemingly, but not in fact, tenable.

The Chinese regulations provide for a prior examination of all applicants for admission, under the General Immigration Law, and that the case shall not be examined under the Chinese Acts until it has been passed under the General Immigration Act. This point has been before the lower court, and its views thereon are registered in the case of *ex parte* Wong Tuey Hing 213 Fed. 112.

We may pass from this feature to the real point, and that is whether a person of Chinese descent charged with entering the United States and being therein in violation of the Chinese Exclusion Acts, may be deported in the manner provided for in the General Immigration Law? If the infraction is a surreptitious entry, that is, an entry without inspection, this may be done U. S. vs. Wong You 223 U. S. 67; If the infraction is moral dereliction, this may be done, Low Wah Suey vs. Backus, 225 U. S. 460; Looe Shee vs. North 170 Fed. 566; If the bar is a dangerous, contagious and loathsome disease, it may be done. In re Lee Sher Wing, 164 Fed. 506.

The point here is not substantially a violation of the General Immigration Law, but a claimed viola-

tion of the Chinese Exclusion Act. The Chinese Exclusion Act provides its own method of deportation, which embraces a Judicial hearing before a justice, judge or commissioner. Section 43 of General Immigration Act provides that it "*shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent,*" Section 21 of the General Immigration Act providing for the machinery for deportations under that act includes therein all persons liable to deportation under that act, "*or of any other law of the United States.*" Now the contention of the government is that the use of the phrase "*or of any other law of the United States,*" gives them the right to arrest, try and deport in the manner provided for in the General Immigration Act, Chinese persons for a violation of solely the Chinese Exclusion Acts. We contend that this would be altering or amending the Chinese Exclusion Acts to the extent of substituting an *executive* hearing for a *judicial* hearing, and is prohibited by said section 43. The cases relied upon by the appellant are:

Ex parte Wong Tuey Hing 213 Fed. 112.

Ex parte Woo Jan, 228 Fed. 927.

U. S. vs. Prentis 230 Fed. 935.
Affirmed C. C. of A. 7th Ct., Oct. term 1916, January session. (Not published yet.)
See Wong Hin vs. Mayo 240 Fed. 368, C. C. of A., 5th Ct.

We interpret the clause *"or any other law,"* as used in this section, to mean merely that when a judicial order of deportation is ready for execution, then the actual deportation may be executed as provided in the General Immigration Law, not that the procedure of arrest and trial shall be had as therein provided. The Chinaman has a substantial right in a *judicial hearing,* which with its greater rights and privileges, better enables him to defend himself against the charge so brought against him. When his judicial hearing is over, and the judgment is a finality, he is only then, in the sense used in the act "liable to deportation" and he cannot be heard to complain whether he be deported by the U. S. Marshall or turned over by that officer to the Immigration officers, for them to place him on the steamer.

The only advantage to the Government which we feel was intended was that the expense or procedure, as the case may be, of providing tickets, etc. would all be in the hands of the Immigration Department, and kept in one uniform account, and their statistical records and research thereof, would be simplified by all being placed through the medium of one set of deportation officers. This interpretation is well within the line of reason and is in harmonious accord with the true operation of both acts, and does not permit the one to encroach upon the other. This construction is in harmonious accord with the statute itself. Section 20 of the General Immigration Law provides for the *hearing* and Section 21 of the *method of actual deportation after* the termination of the hearing, and it is only in the latter section that the phrase *"or of any other law of the United States"* is used.

THIRD:

Under this head we direct attention to the fact of the minority of this defendant, with its accompanying disability. This boy came to his father in Oakland, after they had, by their testimony and that of an identifying witness, the prior landed brother, satisfied the immigration authorities of the *bona fides* of the claim of citizenship. This father, reared and living for many years in San Francisco with its large population of Chinese, has witnessed the evils of the Chinese community, the ever recurring Tong or highbinder outlawery, the pitfalls which beset the paths of the Chinese youths growing up in the midst of unusual liberty and but little restraint, and this coupled with the hostile or unfriendly feeling of the western white population, convinced him that he would make a better future for his son, if he permitted him to go to a more hospitable community, where there existed no embers of Asiatic hostility; where no evil associates would be crowded about him, and where, being permitted to mingle with white people freely, he would acquire a more useful knowledge and education and insure a more useful and contented life, and so the father permitted his little son to go to the south.

An examination of the record for the purpose of showing the points of unfairness in the executive hearing, brings to light a number of glaring particulars, in which the rights of this appellant have not been properly or at all safeguarded.

(a) The first point which we desire to urge is that the warrant of arrest in this case is issued in violation of Article 4 in Amendment to the Constitution of the United States in that the warrant of arrest was issued and was not based "upon probable cause, supported by oath or affirmation." The legal presentation of this point is now under submission of this court in case No. 2859, Chin Ah Yoke alias Jane Doe, Appellant, vs. Edward White, as commissioner, etc., taken under submission at the February term of this court, and reference is made to pages 21 to 27 inclusive of the brief for appellant, filed in said matter, for the presentation of the legal view raised upon behalf of the appellant herein on said point.

(b) The hearing herein was unfair in that no opportunity was given the appelant to be represented by counsel when it would have been of any service to him. Appellant, a boy of nine years of age, according to American calculation, or ten years according to Chinese calculation, was, despite his youth and immaturity, subjected to a gruelling examination, which is to be found from pages 19 to 31 in Exhibit "A", filed with the clerk herein. This examination is 13 pages in length. The Inspector, after asking all the questions he could think of, finally propounded this last question to the appellant: "Q. Under the law you have a right to be represented by an attorney at this year. Do you wish to avail yourself of that right and employ a lawyer? A. I don't understand that. I will see Loo Yut."

This question and answer perforce, is the arraignment of this nine year old child, in which it is pre-

sumed that he would know what the nature of the proceedings were, and what to do to protect and safeguard his rights. The Loo Yut referred to, was immediately examined, and his examination covers pages 15 to 19 inclusive of Exhibit "A" filed with the clerk herein. All that was done to speak to Loo Yut about the matter appears in the last question of his examination which is as follows: "Q. Under the law this boy has a right to be represented by an attorney at this hearing, if he so desires. He says that he will see you about it. Do you wish to employ a lawyer for him? A. No I will not employ a lawyer now. I will wait and see what they do in Washington." This hearing was conducted on July 17, 1916.

This little child was, upon that date, subjected to this examination, and his witness was also examined, without any adequate opportunity being afforded to safeguard the rights of this applicant. Not only does this condition exist, but the most detrimental thing in connection with it is that there was no notification that they could see the evidence against the boy to enable them to determine whether it was necessary to submit any defense, thus violating their own regulations which are mandatory that this be done.

The Immigration regulations promulgated which govern such executive deportation proceedings are found in Rule 22 sub. 4 as follows:

> "Executive of warrant of arrest and hearing thereon:
>
> (a) Upon receipt of a warrant of arrest the alien shall be taken before the person or persons

therein described and granted a hearing to enable him to show cause, if any there be, why he should not be deported.

(b) During the course of the hearing the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued; and at such stage thereof as the officer before whom the hearing is held shall deem proper, he shall be apprised that he may thereafter be represented by counsel and shall be required then and there to state whether he desires counsel or waives the same, and his reply shall be entered on the record. If counsel be selected, he shall be permitted to be present during the further conduct of the hearing, to inspect and make a copy of the minutes of the hearing, so far as it has proceeded, and to offer evidence to meet any evidence theretofore or thereafter presented by the Government. Objections and exceptions of counsel shall not be entered on the record, but may be dealt with in an accompanying brief."

(c) Evidence detrimental to the appellant, was submitted to the Department under cover of the report of the examining inspector. This report is on pages 34 and 35 of Exhibit "A," filed with the clerk. The part of the report to which exception is taken is as follows:

"And little is to be added other than to state that since the hearing on the above date, information was obtained by Inspector Worden while

in Montgomery, on the 25th ultimo, to the effect that this boy is the son of Loo Gee of Birmingham, Ala., and is not the son of Mok Juck, Oakland, California, and that the Chinaman Loo Yut or Lo Mong Nam, with whom the boy is living at Alexander City, Ala., and who deposited the thousand dollars cash with the bondsmen in the case, is Loo Gee's brother, and therefore the uncle of the alien. This information was received in a confidential manner from one Chung Kee Lung of Montgomery, Alabama, but no statement could be secured from him for obvious reasons."

This bit of evidence is the only thing contained in the entire Immigration record which negatives the claim of citizenship of this appellant, and yet the attention of the appellant or his witness was not called to it, but on the contrary, it appears to have been willfully and purposely suppressed and withheld from them. That it was considered by the Department, and went to support and made up the adverse finding of the Secretary, and contributed towards the issuance of the warrant of deportation, is evidenced by the fact that the evidence is reported almost verbatim in the decision of the Assistant Secretary, wherein the warrant of deportation is directed to be issued. It is fundamental in cases of this kind, that a person proceeded against, must be apprised of all of the evidence against him, so that he may have full opportunity of making answer thereto. (Rule 22 sub. 4 supra.)

In the present case there appears to have been a successful suppression of the only affirmative evidence submitted to the department, showing, or tending to show that this appellant was not a citizen.

(d) A further element of unfairness of this hearing appears from the fact that no attempt at all was made to secure the testimony of this appellant's father. The record discloses that a letter was sent from Alabama, which finally reached the Commissioner of Immigration at San Francisco, and an effort was made to locate the father of this appellant, and when they did locate the father of this appellant, they did not even notify him or tell him of the trouble in which his son was involved. They did not ask him any questions at all, which would have shown the citizenship of this appellant. The examination seemed to have been conducted and was limited solely to ascertaining the fact that the father was in Oakland, California. These letters, and the examination in question may be found on pages 1, 2, and 3, of Exhibit "A," filed with the clerk herein. The propriety of giving the father of this boy a chance to be heard upon behalf of his boy, and notifying him of the conditions existing, was called to the attention of the Department, as is shown on page 34 of Exhibit "A," when the Inspector in charge, Thos. V. Kirk, suggested to the Commissioner General of Immigration, that the record be sent to San Francisco, to examine the father, but this suggestion was not complied with. A study of the record in this deportation case will show that it was conducted solely by the government officers for the presentation of their own case, and

without adopting even those usual methods followed in obtaining the evidence from a witness then under examination, for the defendant. What would a little boy, nine years of age, know about safeguarding his interests, or whether he needed an attorney or not, or what should be done, when confronted with a deportation proceeding. Certainly, the proper thing to have done, would have been to have considered him, so to speak, as the ward of the court, as all minors are considered, in probate courts, and their rights should be protected as such. In this case, the record of the landing of this appellant in the United States, shows the positive nature of the testimony presented upon his behalf. We refer to page 13, of Exhibit "B" filed with the clerk, which contains the report of the examining inspector, when this appellant was an applicant for admission into the United States. The report is dated November 8th, 1915, and is found in the Admission Record Exhibit "B" filed with the clerk and at page 13 thereof.

> "The applicant in this case is only 8 years of age actual or American reckoning. There are several discrepancies in the testimony relating to the locations of the applicant's house, whether he accompanied his brother to the front of the village or Chek Hom market when the brother left for the U. S., the exact location of the ancestral hall, and the names and locations of some of the neighbors. These disagreements, however, are, in my opinion, not sufficient under the circumstances, to warrant denial, as they are such

as might be due to the extreme youth of the applicant.

"There is a good resemblance between the father, the applicant and the brother, who appeared as a witness. Another favorable feature is the fact that although the father was old enough to have claimed several boys born prior to his return to the U. S. in 1903, he claims only one such child.

"In my opinion, there is not sufficient adverse evidence to justify the denial of the applicant. A favorable recommendation is therefore submitted."

Pages 11 and 12 of this Exhibit "B" contain the said Inspector's abstract of record and report, and from this appears in part that the father's American nativity is established; his presence in China on the trip essential to permit of paternity is verified; there is a prior landed brother and this applicant is mentioned in the testimony in that case; that there is a good resemblance between the father and applicant; between the prior landed brother and the applicant, and betwen the father and the prior landed brother; that the prior landed brother was a supporting witness; that the demeanor of all witnesses during examination was satisfactory; that none of them were substantially discredited before the Immigration office to the knowledge of the Inspector, and that the Inspector believed the relationship existed. When the father returned here in 1903 he testified that he was married and then had one son (page 2 of father's exa-

mination in his own prior landing record in Exhibit "B".)

There was no action taken by the Immigration authorities to notify the father that his son had been arrested. The father was examined to ascertain the fact that he himself was physically present in Oakland, California on March 14th, 1916, as is shown on page 3 of Exhibit "A," which is the report of the Immigration Inspector, stating that he called at the laundry, and found the father there. The warrant of arrest was issued months thereafter, and the actual arrest of this little appellant and the hearing on the warrant apparently both took place on July 17, 1916. The Immigration record upon which the applicant had been admitted into the United States, was apparently considered as part and parcel of the hearing, as is shown by page 33 of Exhibit "A."

In finally submitting this matter, we feel compelled to say that there has been no full or fair hearing accorded this appellant by the Immigration authorities upon the warrant of arrest, and that the action of said officers in transmitting evidence to the Department clandestinely, as far as the appellant was concerned, is in and of itself an act of unfairness of such a glaring kind and character, that it cannot be overlooked. The evidence transmitted, constituted and was the only evidence before the Department which tended to show that this appellant was an alien, or not the person who he claimed to be, and to have concealed from him the knowledge of this evidence, and giving him no opportunity to make answer thereto, was certainly most unfair and prejudicial, and cre-

ates the impression that the Inspector considered that he had the right to transmit evidence against the appellant without notifying him of it. This clearly in violation of the rules and regulations. Special attention is directed in this case to the Immigration record Exhibit "A", wherein it is set forth that this case is almost exactly the same as the case of Wong Yee Toon, who had been arrested under a similar warrant of arrest, and had been ordered deported by a United States District judge in the case of *ex parte* Wong Yee Toon, 227 Fed. 247 decided by District Judge Rose, and because that applicant was deported and that warrant of deportation was upheld that this appellant should be ordered deported. It is a matter of some little satisfaction to counsel to be able to point out that the judgment of the lower court in *ex parte* Wong Yee Toon has been reversed on appeal, by the Circuit Court of Appeals for the Fourth District, the title being Wong Yee Toon vs. Stump 233 Fed. 194, to which decision the attention of this Honorable Court is most respectfully invited. We think the particular elements of unfairness of the hearing set forth herein warrant the issuance of the writ of habeas corpus as prayed for in the petition in this matter, upon the ground that the hearing accorded was unfair upon the authority of the following decisions:

Low Wah Suey vs. Backus 225 U. S. 460.

Chin Yow vs. U. S. 208 U. S. 8.

Whitfield vs. Hanges 222 Fed. 745.

Ong Chew Lung vs. Burnett 232 Fed. 853.

Chan Kam vs. U. S. 232 Fed. 855.

Ex parte Lam Pui 217 Fed. 456.

Ex parte Lam Fuk Tak 217 Fed. 468.

McDonald vs. Sin Tak Sam 225 Fed. 710.

U. S. vs. Williams 200 Fed. 538.

U. S. vs. Williams 189 Fed. 915.

U. S. vs. Williams (affirmed) 206 Fed. 460.

U. S. vs. Williams 175 Fed. 274.

Respectfully submitted,

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